No. 16580

IN THE

# United States

# Court of Appeals

## For the Ninth Circuit

ALBERT LOPEZ GALLEGO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

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## INTRODUCTION

The Appellee, Plaintiff below, will be designated as the Government. Appellant, Defendant below, will be designated as Appellant herein. Transcript of Proceedings prepared by the Court Reporter will be abbreviated T.P. Transcript of Record prepared by the Clerk of the United States District Court will be designated T.R.

## JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Arizona adjudging Appellant guilty of

an indictment charging Appellant with a violation of Section 176a of Title 21, United States Code, unlawful importation of marihuana.

The jurisdiction of the United States District Court was based upon Section 3231, Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under provisions of Sections 1291 and 1294 of Title 28, United States Code.

## STATEMENT OF THE CASE

Appellant was indicted in the United States District Court for the District of Arizona for importing and bringing into the United States approximately 11 ounces of bulk marihuana and approximately 17 marihuana cigarettes in violation of Section 176a, Title 21, United States Code (R.T. 89). He was found guilty after a trial by jury (R.T. 26, 27). He was sentenced as a first offender to the minimum imprisonment of five (5) years prescribed by the Act as amended by the Narcotic Control Act of 1956, effective July 19, 1956 (R.T. 78). The facts relating to the trial errors alleged by Appellant are as follows:

1. *Admission into evidence of the bulk marihuana, Gov. Exh. 1A, and the marihuana cigarettes, Gov. Exh. 1B.* — On April 3, 1959 Immigrant Inspector Percy J. Schugk and Customs Inspector Donald Mcnab stopped the Appellant as he was entering the United States from Mexico at Naco, Arizona to check his car and person (T.P. 7-10, 45). In the trunk of Appellant's car a paper sack (Gov. Exh. 1A) was found by Inspector Schugk which contained a substance which appeared to be marihuana (T.P. 9). Inspector Schugk handed the sack to Customs Inspector Mcnab who took same to the home of the Deputy Collector of Customs, Fred Valenzuela, in Naco, Arizona for his inspection (T.P. 49, 50). Both men returned with the sack to

the Customs House. On the arrival at the Customs House located at the Border, of Deputy Collector Valenzuela, the Appellant was personally searched by him and a Prince Albert tobacco can containing what appeared to be marihuana cigarettes was found in his pants pocket (T.P. 77, 78). During the search of Appellant's person the sack (Gov. Exh. 1A) was placed by Deputy Collector Valenzuela in a closed desk in the Customs House for approximately one hour and during this hour the Collector was in the vicinity of the desk at all times (T.P. 90). That same night the sack and can were placed in a safe in the Customs House by Deputy Collector Valenzuela (T.P. 81). The next day Deputy Collector Valenzuela personally took the sack and can to the Commissioner's hearing (T.P. 82-85), after which he replaced them in the safe at the Customs House where they remained until he sent the sack (Gov. Exh. 1A) and the can (Gov. Exh. 1B) by registered mail to the Customs Laboratory in Los Angeles, California (T.P. 82, 83). After the contents of the sack and can were analyzed by Chemist Denzel Curtis in the Laboratory at Los Angeles, they were returned by registered mail to the Deputy Collector at Naco, Arizona (T.P. 102). The safe in which the sack and can were placed had a combination lock. The combination was known by Deputy Collector Valenzuela and the Acting Deputy Collector who takes Mr. Valenzuela's place when he is gone (T.P. 84). At the trial, Inspector Schugk and Deputy Collector Valenzuela testified that the contents of the sack (Gov. Exh. 1A) and the can (Gov. Exh. 1B) were substantially in the same condition as when they were taken from Appellant (T.P. 12 and 78).

2. *Sentence imposed.* — The only facts in the record pertaining to this issue are that the Appellant was sentenced as a first offender to the minimum sentence of five (5) years as prescribed by law (T.R. 78).

## ARGUMENT I.

Appellant contends that Government's Exhibits 1A and 1B, the sack of marihuana found in the trunk of his car, and the can of marihuana cigarettes taken from his person, were not properly admitted into evidence because the chain of custody was not complete and exclusive (Appellant's brief, page 3). This claim is not substantiated by the record. The Appellant takes the position that it is incumbent upon the Government to exclude any and every possibility that might have been present for any person to handle the exhibit in question. Specifically the Appellant claims it was incumbent upon the Government to call as a witness the Acting Deputy Collector who knew the combination of the safe where Government's Exhibits 1A and 1B were kept to state that he did not tamper with the exhibits. (Appellant's Brief 5 and 6). The cases cited by the Appellant do not substantiate this position. The rule is certainly not that the Government has to produce as a witness every person who might have touched or handled the exhibits. The Government does have to show that the exhibits were in substantially the same condition as when they were obtained. This exact rule is discussed in U. S. vs. S. B. Penick and Co., 136 F. 2d 413, in which the court citing from the case of Pennsylvania Railroad Co. vs. Fox and London, 93 F. 2nd 669, certiorari denied, 304 U. S. 566, and Hanify Co. vs. Westberg, 16 F. 2d 552, stated at page 415,

> "It is true that before a physical object connected with the commission of a crime can properly be admitted in evidence, there must be a showing that such object is in substantially the same condition as when the crime was committed. 2 Wharton, Criminal Evid, 11th Ed. 757. But there is no hard and fast rule that the prosecution must exclude all possibility that the article may have been tampered with. (Cases cited.) In each case the trial judge

before he admits it in evidence must be satisfied that in reasonable probability the article has not been changed in important respects. Wigmore, Evidence, 3d Ed. 437(1); 32 C.J.S. Evidence, 607). In reaching his conclusion he must be guided by the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. Here the samples were taken in the ordinary course of business for the very purpose of being retained as samples; they were put in the usual place where samples were kept to remove them from accident or meddling and there they remained, so far as appear, undisturbed. We think this showing was sufficient to justify admission in evidence of the bottles and their contents and that it was for the jury to decide how likely it was that some other substance had been substituted for what was originally put in the bottles . . ."

The testimony of the Government's witnesses show that Exhibits 1A and 1B were in substantially the same condition at the time of the trial as when acquired by the Government officers from the Appellant (T.P. 12, 78). There is no scintilla of evidence that would indicate this is not true. Further, every moment from the time the sack and can were taken from Appellant's car and person to the time they were introduced in evidence was accounted for in the testimony of the persons who handled them. See Jurisdictional Statement supra, page 1.

## ARGUMENT II.

The Appellant does not contend that the statute under which Appellant was sentenced was unconstitutional *generally* but contends that in *this specific case* it was in violation of Article 8 of the Constitution of the United States which forbids any cruel and unusual punishment because it deprives the Appellant of the right of parole and probation and good time treatment while

serving his sentence. (Appellant's brief, page 8.) In support of this proposition the Appellant cites U. S. vs. Rosenberg, et al. 195 F2 583. The quotes cited by the Appellant from this case are only dicta as they follow the statement by Justice Frank at page 605, "The subsequent paragraphs express only the views of the writer of this opinion." Even in this portion of the opinion, at page 605, Justice Frank states, "No Federal decision seems to have held cruel and unusual any sentence under a statute which itself was constitutional." Prior to this portion of the opinion containing only the views of Justice Frank, the Court states at page 604,

> "Unless we are to over-rule sixty years of undeviating federal precedents, we must hold that an appellate court has no power to modify a sentence. 'If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by the statue.' Gurera v. Unied States, 8 Cir., 40 F. 2d 338, 340. Cased cited * * *. In Blockburger v. United States, 284 U. S. 299, 305, 52 S. Ct. 180, 182, 76 L. Ed. 306, the Supreme Court said: 'Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but, there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part.' "

The Appellant, 24 years of age, was sentenced to the minimum sentence (five years) that could be imposed under the statute 21 U.S.C. 176a of which he was convicted.[1]

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[1] 21 U.S.C. 176a provides in part that any person convicted of this section shall be imprisoned not less than 5 nor more than 20 years and in addition may be fined not more than $20,000.00.

The same rule as discussed above in the Rosenberg case is set forth in the case of Brown vs. U.S., 9th Cir. case cited at 222 F. 2d 293 at 298.

The Appellant states in his brief that he is deprived of good time allowance. (Appellant's brief page 8.) We wish to point out that this is erroneous. 26 U.S.C. 7237(d) as amended in 1956 made persons convicted under 21 U.S.C. 176a ineligible for parole under 18 U.S.C. 4202, but not ineligible for good time allowance under 18 U.S.C. 4161.

## CONCLUSION

For the reasons stated, we respectfully request that the Court sustain the conviction and judgment entered herein.

Respectfully submitted,

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